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September 14, 2016

Mark Langer, Clerk
U.S. Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave. NW
Washington, DC 20001

Re: *Price-Simms, Inc. v. NLRB* -- Case Nos. 15-1457, 16-1010

Dear Mr. Langer:

Pursuant to Rule 28(j), we submit this letter responding to the NLRB's September 13, 2016 letter.

In *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016), a divided panel held that the *Murphy Oil* rule is not precluded by the FAA because "illegality" is a basis for revocation of an arbitration agreement. The majority relied on the notion that "the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA." *Morris*, 2016 WL 4433080, at *6. However, as explained in our reply brief (at pages 6-7), the Supreme Court rejected the same argument in *Concepcion*.

The *Morris* majority attempted to distinguish *Concepcion* on the basis that "*Concepcion* involved a consumer arbitration contract, not a labor contract" and that "[t]he defense in that case was based on a judge-made state law rule," while in *Morris*, "the illegality of the contract term . . . follow[ed] directly from the NLRA." However, as demonstrated in our reply brief (at pages 8-10), neither the FAA's savings clause nor the holding in *Concepcion* that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration" depends on the source of the "rule" relied upon to attack the enforceability of an arbitration agreement. Indeed, in *Italian Colors*, the Supreme Court rejected the reasoning relied upon by the *Morris* majority. In doing so, the Court explained, "Truth to tell, our decision in [*Concepcion*] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration.'" *Italian Colors*, 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 344).

As stated by Judge Ikuta in her dissent, the issue is not whether the *Murphy Oil* rule falls within the FAA's savings clause, but instead whether Section 7 is a "contrary congressional command" that overrides the FAA. As explained in our briefs and Judge Ikuta's dissent, it is not.

Sincerely,

Michael G. Pedhirney

:MGP
cc: All counsel (via CM/ECF)

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